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IN THE COURT OF APPEALS OF INDIANA

DARRELL E. CARDWELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A05-0802-CR-105
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Stephen M. Jessup, Judge
Cause No.34D02-0511-FD-442

October 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a guilty plea, Darrell Cardwell appeals his sentence of three years for nonsupport of his two dependent children, a Class D felony. On appeal, Cardwell raises one issue, which we restate as whether Cardwell's statutory maximum sentence of three years is inappropriate in light of the nature of the offense and Cardwell's character. Concluding that Cardwell's sentence is inappropriate, we reverse and remand with instructions that the trial court sentence Cardwell to an advisory term of one and one-half years.

Facts and Procedural History

On November 4, 2005, the State charged Cardwell with nonsupport of his two dependent children, a Class D felony. According to the prosecuting attorney's affidavit filed with the charging information, on April 19, 1995, the Howard County Superior Court ordered Cardwell to pay child support in the amount of $125 per week for his two minor children. By February 17, 2005, however, Cardwell was $12,159 in arrears. Cardwell made several payments over the next eight months, but by the end of October 2005, the arrearage had increased to $13,539.

On September 14, 2006, Cardwell agreed to plead guilty pursuant to a plea agreement. The plea agreement stated, among other things, that sentencing was left to the trial court's discretion and that the State would not object to Cardwell serving probation in his "State of residence."[1] Appellant's Appendix at 9 (Volume II).[2] On

[1] It is unclear why the parties included the latter provision because the presentence investigation report (the "PSI") states that Cardwell resides in Kokomo.

[2] The PSI is inserted into Cardwell's appendix, but is not numbered consecutively with the other appendix documents. We remind Cardwell's counsel of Indiana Appellate Rule 51(C): "All pages of the Appendix shall be

October 17, 2006, the trial court conducted a hearing, at which it took Cardwell's guilty plea under advisement pending review of the PSI. After several continuances, on January 31, 2008, the trial court accepted Cardwell's guilty plea and entered a judgment of conviction. The record does not include a complete transcript from this hearing because the trial court's audio recording equipment failed while Cardwell was testifying. Nevertheless, following the hearing, the trial court entered an order sentencing Cardwell to a term of three years to be served with the Indiana Department of Correction. Cardwell now appeals.

Discussion and Decision

I. Standard of Review

Indiana appellate courts have authority to revise a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). When making this examination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) ("[I]nappropriateness review should not be limited . . . to a simple rundown of the aggravating and mitigating circumstances found by the trial court."). However, it is the defendant's burden to "persuade the appellate court that his or her sentence has met this

numbered at the bottom consecutively, without obscuring the Transcript page numbers, regardless of the number of volumes the Appendix requires." In the case of documents (such as presentence investigation reports) that are excluded from public access, see Ind. Administrative Rule 9(G) and (J), such documents should be compiled in an appendix in a manner consistent with Indiana Trial Rule 5(G), but also numbered consecutively with the other appendix documents.

inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

II. Appropriateness of Sentence[3]

The trial court sentenced Cardwell to three years, which is the statutory maximum sentence for a Class D felony. See Ind. Code § 35-50-2-7(a) ("A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years.").[4] This court has observed repeatedly that maximum sentences should be reserved for the worst offenses and offenders. See Roney, 872 N.E.2d at 207; Haddock v. State, 800 N.E.2d 242, 248 (Ind. Ct. App. 2003). At the same time, however, reading this observation narrowly "would reserve the maximum punishment for only the single most heinous offense." Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied.

[3] The State argues Cardwell has waived the right to challenge the appropriateness of his sentence because he failed to supplement the partial transcript of the January 31, 2008, sentencing hearing with other evidence (our appellate rules outline a procedure for reconstructing a transcript where all or part of it is unavailable, see Ind. Appellate Rule 31). Although the trial court's oral statements during the sentencing hearing would have aided our review, their absence does not preclude it. See Roney, 872 N.E.2d at 206 (recognizing that a reviewing court "may look to any factors appearing in the record" in conducting sentence review under Appellate Rule 7(B)); Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006) (explaining that a reviewing court "will assess the trial court's recognition or nonrecognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed here was inappropriate" (emphasis added)). More to the point, because the record contains evidence commenting on the nature of the offense and Cardwell's character, it does not prevent us from conducting a meaningful review of Cardwell's sentence. Cf. Miller v. State, 753 N.E.2d 1284, 1287 (Ind. 2001) (finding waiver where the defendant's failure to include a transcript as part of the record prevented "intelligent review of the issues").

[4] Cardwell claims the presumptive sentencing scheme applies, presumably because he accumulated the bulk of the child support arrearage prior to April 25, 2005, which is the date the current advisory sentencing scheme became effective. See Anglemyer v. State, 868 N.E.2d 482, 491 n.9 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. Cardwell's claim raises an interesting question because the charging information alleges he committed the offense "on or about and before the 28th day of October, 2005 . . . .", appellant's app. at 10 (Volume II), which suggests the advisory sentencing scheme applies, see Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007) (explaining that the sentencing statute in effect at the time a crime is committed governs the sentence for that crime). Nevertheless, because application of either the presumptive or advisory sentencing scheme does not affect our determination of whether Cardwell's sentence is inappropriate, we will refer to the advisory scheme for ease of reference. Cf. Primmer v. State, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006) (declining to decide which statutory scheme applies because "the outcome in this case is the same regardless of which sentencing scheme is applied"), trans. denied.

Instead, a reviewing court "should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character." Id. With these observations in mind, we turn to the nature of the offense and Cardwell's character.

A. Nature of the Offense

Cardwell argues his offense is less egregious than is typical because he at least made "sporadic" child support payments. Appellant's Brief at 8. According to documents the State filed with the charging information, on April 19, 1995, an order was entered requiring Cardwell to pay $125 a week as his child support obligation, and by October 31, 2005, Cardwell had accumulated an arrearage in the amount of $13,539. The record thus indicates that Cardwell paid slightly over eighty percent of his child support obligation for the period from April 19, 1995, to October 31, 2005.[5] Although we do not condone Cardwell's failure to pay his child support obligation in full, and note as an aside that Cardwell could have petitioned the Howard County Superior Court to modify its order if he was unable to meet his obligation, neither are we able to conclude that Cardwell's offense constitutes the most egregious instance of nonsupport. Cf. Jones v. State, 812 N.E.2d 820, 826 (Ind. Ct. App. 2004) (concluding trial court did not abuse its discretion in sentencing defendant to the statutory maximum term of eight years for Class C felony nonsupport of a dependent child where trial court found that defendant's

[5] There are slightly over 546 weeks during the time period, which yields a total support obligation of approximately $68,250. An arrearage of $13,539 means Cardwell paid approximately $54,711, which is approximately eighty percent of his obligation for the period.

accumulation of an arrearage in excess of $83,000, which included failure to make any payments for nearly four years, was an aggravating circumstance).

B. Character of the Offender

Regarding Cardwell's character, we note initially that his criminal history consists of a charge in 1990 of operating a vehicle while intoxicated that was disposed of through pre-trial diversion, a conviction in 1994 of public intoxication, and a pending charge in February 2005 of operating a vehicle while intoxicated. At least in relation to the instant offense, Cardwell's criminal history does not provide substantial negative commentary on his character. See Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999) (explaining that the aggravating (or mitigating) weight assigned to a defendant's criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense. Therefore, a criminal history comprised of a prior conviction for operating a vehicle while intoxicated may rise to the level of a significant aggravator at a sentencing hearing for a subsequent alcohol-related offense. However, this criminal history does not command the same significance at a sentencing hearing for murder.").

We also note that Cardwell pled guilty without receiving any apparent substantial benefit, as the plea agreement left sentencing to the trial court's discretion and there were no other pending charges subject to dismissal by the State. Although we recognize Cardwell's guilty plea may have been pragmatic because convicting him may have simply been a matter of introducing several certified documents into evidence, see Primmer, 857 N.E.2d at 16 (stating that a guilty plea may "be considered less significant if there was substantial admissible evidence of the defendant's guilt"), it nevertheless

comments somewhat favorably on Cardwell's character because it saved the State the time and expense of going to trial, see Hope v. State, 834 N.E.2d 713, 719 (Ind. Ct. App. 2005) (recognizing that "even an 'open-and-shut' case requires in most cases the considerable time and expense of calling and impaneling a jury; even in such cases, missteps during trial can lead to an unexpected result . . . .").

The State argues that Cardwell's posting of a $1,000 bond shortly after his arrest comments negatively on his character because it shows Cardwell "plac[es] his own needs over those of his children." Appellee's Brief at 7. We agree with the State to an extent, but also note that Cardwell testified during the sentencing hearing that he "had to pay the thousand dollars back . . . ." Transcript at 13. Thus, this is not necessarily a situation where Cardwell had money at his disposal and simply refused to use it to fulfill his child support obligation. Moreover, against the mitigating weight of Cardwell's guilty plea, we are not convinced that Cardwell's character warrants the statutory maximum sentence.

After due consideration of the trial court's decision and of the record, we conclude that Cardwell has met his burden of establishing that his statutory maximum sentence of three years is inappropriate in light of the nature of the offense and his character. We also conclude that the advisory sentence of one and one-half years executed is appropriate.

Conclusion

Cardwell's sentence is inappropriate in light of the nature of the offense and his character. Accordingly, we reverse and remand with instructions that the trial court enter a sentence of one and one-half years executed.

Reversed and remanded.

NAJAM, J., and MAY, J., concur.